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Regret and Contract "Science"

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ESSAY

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INTRODUCTION

"Contracts" is the only non-contingent subject for legal study; everything else is elaboration on the contract theme.¹ Much as a Unified Field Theory² would

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Debates over the question of why promises are binding will no doubt continue to occupy the attention of philosophers and legal scholars. Such debates raise issues that are fundamental to western political thought—issues such as individual freedom versus collective control, economic efficiency versus non-economic values, or (more generally) consequentialist systems of ethics versus deontological ones.

Id. at 528.

2. As Brian Greene has written:
make ultimate sense of physics, a unified theory of contract would make sense of much of our jurisprudence. Such coherence is desideratum. Few matters of human engagement admit of a single animating theory or principle. That does not, however, deter the determined—those who reason that much can be learned even in an ill-fated effort to discover the underlying cause.

The scholars who have endeavored to formulate Contract on the head of a pin have, alternatively, concluded that even after exhaustive study more work remains to be done, or that a single theoretical or quantitative formula is available to harmonize the cacophony. Still other significant inquiries have concluded that the answer to the Contracts question is not unlike the “cures” for cancer: There is not one single silver bullet, but instead an array of theories or principles that explain why courts enforce the promises they do and refuse to enforce others.

Into this fray leaps E. Allan Farnsworth, the Reporter for much of the Restatement (Second) of Contracts, with his monograph, *Changing Your Mind:*

In Einstein’s day, the strong and the weak forces had not yet been discovered, but he found the existence of even two distinct forces—gravity and electromagnetism—deeply troubling. Einstein did not accept that nature is founded on such extravagant design. This launched his thirty-year voyage in search of the so-called unified field theory that he hoped would show that these forces are really manifestations of one grand underlying principle.


3. See, e.g., P. S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 778-79 (1979) ("I may conclude by suggesting that the time is plainly ripe for a new theoretical structure for contract, which will place it more firmly in association with the rest of the law of obligations."); MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 268 (1993) ("Ultimately, then, my exploration of the limits of freedom of contract suggests . . . broad strategies that require much greater collective attention in the future.").


5. See, e.g., Charles J. Goetz & Robert E. Scott, Enforcing Promises: An Examination of the Basis of Contract, 89 YALE L.J. 1261, 1281 (1980) ("For the damage rule to deter all promises with net social costs and encourage those with net benefits, the amount of damages awarded must satisfy the following equation: \((1 - p)D = (1 - p)R - pB\), where R and B are the values of detrimental and beneficial reliances, respectively.").


7. Professor Farnsworth was the Restatement Reporter from 1971 to the project’s completion in 1981. He was responsible for chapters 6-8, 9 (Topic 5), 10-12, and 16 of the Restatement (Second) of Contracts. Farnsworth succeeded Robert Braucher of the Harvard Law School and then the Supreme Judicial Court of Massachusetts.
The Law of Regretted Decisions. The book is an ambitious effort to cut across legal categories to reveal the incongruous legal responses to regret, and discern what fundamental principles animate the law of regret. Once those principles are revealed, incongruities in our conception of Contract should be manifest. The courts and legislatures could respond by doing a better job of treating like cases alike. That, at least, is the inference we may draw from Farnsworth’s exposition and argument.

Farnsworth is clearly a scholar in the “realist” tradition. He reveals his pedigree in the course of considering “Why a Promise Should Commit”: “My own belief is that no single explanation will suffice and that the answer is a complex mix of explanations that focus on both promisor and promisee. The instances in which promises should be enforced are too varied to be shoehorned into the confines of a single rationale.” Those premises support Farnsworth’s derivation of six essential principles underlying the legal response to regret: (1) the reliance principle; (2) the intention principle; (3) the dependence principle; (4) the anti-speculation principle; (5) the public interest principle; and (6) the repose principle. To appraise the contribution of Regret it is necessary to give substance to those principles and to compare Farnsworth’s understanding of them with the extant Contracts literature. Further, it is worthwhile to appreciate the extent to which Farnsworth’s approach to Contract “science” responds to the crises confronting contemporary contract theory.

This Essay will set Farnsworth’s Regret in jurisprudential context. It will consider his identification and invocation of the Contract principles to identify the place of Regret in the canon. The effort requires, first, in Part I, a description of the tradition from which Farnsworth’s method proceeds and a comparison of that method with alternative perspectives. Formulation of that relationship provides a frame of reference to inform an appreciation of Contract “science” consistent with Farnsworth’s Regret. That exposition will support the argument that, so far as the elaboration of a Contract “science” is concerned, the distinc-

9. See Barnett, supra note 6 and accompanying text.
10. FARNSWORTH, supra note 8, at 37.

It is, then, not just a little curious that most of the scholarly reactions to the puzzle of promise enforcement draw on case law often dating back a hundred years or more. See, e.g., Atiyah, supra note 3 (tracing development of contract theory from 1770 to late twentieth century); Goetz & Scott, supra note 5, at 1305 (citing Devecmon v. Shaw, 14 A. 464 (Md. 1888), and Ricketts v. Scothorn, 77 N.W. 365 (Neb. 1898), to support conclusion that “[c]onventional analysis has long assumed that promissory estoppel is a readily available means of enforcing relied-upon nonreciprocal promises”). The implication that the relationship between promissory estoppel and relied-upon nonreciprocal promises has remained fixed in the Contracts law is perhaps more provocative than the authors acknowledge—and more revealing of the nature of Contracts jurisprudence than the authors recognize. Farnsworth’s inquiry also finds much of contemporary currency in “settled” Contracts doctrine.
tion drawn between apparently incompatible scholarly approaches to Contract reveals only a false dichotomy, ultimately powerless to respond to evolving Contract "crises." Part II considers the relationship among principles that emerges from the jurisprudence of Lon Fuller and Allan Farnsworth. The focus here is on the parallels between the two commentators' "scientific" method and its relation to other forms of Contract inquiry. This Part discovers the deficiency in a perspective that fails to appreciate the fit among complementary principles. Finally, Part III discerns the limits of Farnsworth's principles and, therefore, of his analysis, in terms that establish the essential difference between the Fuller and Farnsworth theses.

There is a good deal at stake in efforts to approach a "science" of Contract. Though theories of "consensual" obligation abound—and critics and apologists for the status quo continue to draw lines in the jurisprudential sand—the development of a framework to impose some order on contemporary conceptions of Contract law may introduce a common vocabulary into the academic debate. Such a framework would distinguish consensus from conundrum.

I. OF INTERESTS AND PRINCIPLES

Contracts scholarship—at least in what might be deemed the Modern era—often begins with a survey of the perspectives that have informed the current debate.12 To that survey, the commentary typically offers a construction that corrects the errors of those earlier scholars13 or posits and then responds to the questions left unanswered by the inquiries precedent.14 Though reliance on such cursory exposition is problematic—one wonders whether the scholars whose works have been summarized are satisfied with the accuracy of the summaries—the approach nurtures an intellectual honesty that serves as a worthwhile check on the proliferation of spurious theory. Each successive contribution's place in the literature is staked out, or at least asserted, in terms that accommodate comparison.

Farnsworth does offer his reader a sense of where he stands in the Contracts conversation. He confirms what anyone who has used his casebook15 and treatise16 would surmise: The "Interests" analysis pursued by Fuller and Perdue in their 1936 article17 foreshadows Farnsworth's approach to the Contracts jurisprudence. Farnsworth does not invoke the Fuller and Perdue delineation of

12. See, e.g., ATTYAH, supra note 3; TREBILCOCK, supra note 3; Barnett, supra note 4; Richard Craswell, Against Fuller and Perdue, 67 U. Chi. L. Rev. 99 (2000).
13. See, e.g., Barnett, supra note 4, at 271-91 ("Assessing Current Theories of Contractual Obligation").
14. See, e.g., Craswell, supra note 12, at 106-54 (surveying "Modern Normative Analyses" and "Modern Descriptive Analyses").
the expectation, reliance, and restitution interests, but he mines cases in order to juxtapose "principles" in the way Fuller and Perdue juxtaposed the three central Contract remedy "interests." This method reveals inconsistencies in accepted Contract doctrine and accommodates the reformulation of legal rules.

This Part of the Essay will review Farnsworth's elaboration of an analysis fundamentally sympathetic with the Fuller and Perdue approach to distinguish the method of Regret from that of "consequentialist" analyses and other "reductionist" perspectives that find the basis of contract in a unitary conception.

To appreciate the fit among apparently incompatible conceptions of Contract, consider the relationship among values, principles, and rules. Values inform

18. See id. at 53-57.
19. The term "consequentialist" is used by Professor Craswell to describe the economic analysis of contract remedies: "[Economic analysis] asks what consequences will follow from adopting this remedy or that." Craswell, supra note 12, at 107. It is not immediately clear how an analysis that focuses on the consequences of a remedy is peculiarly economic. Indeed, it would be difficult to imagine coherent Contracts scholarship that was not concerned with the consequences of a particular remedy, both for the parties whose controversy is in issue and for those who will find themselves similarly situated in the future.

To be fair, Farnsworth does not eschew economic analysis, and in fact demonstrates more than a passing familiarity with the application of microeconomic principles to legal analysis. For example, in his discussion of the market and the relationship between the expectation and reliance measure of damages, Farnsworth effectively describes the conclusion of economists that, assuming a market, "the expectation measure is a perfect surrogate for the reliance measure, taking loss opportunities into account." Farnsworth, supra note 8, at 115 (citing Melvin A. Eisenberg, The Bargain Principle and Its Limits, 95 Harv. L. Rev. 741, 787 (1982)); see also Goetz & Scott, supra note 5, at 1288. However, it is not clear that Goetz and Scott would consider the expectation measure to be the "perfect" surrogate. See Goetz & Scott, supra note 5, at 1288.

Also, one of Farnsworth's chief arguments in Regret, that the seal or something much like it should be restored to better assure the enforceability of gift promises, substantially tracks the conclusions of Judge Richard Posner, a recognized figure in the Law and Economics movement. Compare Farnsworth, supra note 8, at 82 ("Whatever the appropriate formality, the abolition of the seal without the substitution of some other formality seems rash . . . . [P]romisors should be given back the power that they once had on complying with some formal requirements, to make binding promises to make gifts to others than charities."), with Richard A. Posner, Gratui­tous Promises in Economics and Law, 6 J. Legal Stud. 411 (1977). Posner argues:

The abolition by statute of the seal in many states is therefore a mysterious development from the standpoint of efficiency. The decline of this simple but reliable method of making a gratuitous promise binding has been deplored, and various proposals for a substitute method suggested. The legislative character of the abolition movement may reflect simply the difference between the courts and the legislatures in the emphasis placed on efficiency.

Posner, supra, at 420 (citations omitted). Those examples notwithstanding, Farnsworth's perspective is more in line with the premises and approach of Fuller and Perdue than it is with Posner, Goetz, and Scott.

20. See, e.g., Barnett, supra note 4; Burton, supra note 6.
21. There is, of course, nothing irrefutable about positing a Values – Principles – Rules continuum. Conscientious conceptions of those three points could easily suggest close questions of characterization: One person's value may be another's principle, for instance. The statement of the Values – Principles – Rules continuum operates primarily to offer a conception of the relationship among the points of abstraction and could as easily take the form: Universal – General Context – Specific Instance. Indeed, Craswell uses the term "goal" in a sense that might correspond with my use of "values." See
principles which, in turn, inform rules. Serious contemporary Contracts scholarship generally (and, admittedly, it is dangerous to generalize) follows a heuristic method that distills from rules the principles that animate them. Then the scholarship often, either implicitly or explicitly, posits the values that are antecedent to the principles. Deontological theory may start with an assertion of values and then use that normative template to critique existing rules. Consequentialist theory may start with the rules and try to discover their source.

The object of the two approaches—deontological and consequentialist—is essentially the same: to discover why some promises are enforced and others are not. The difference between the methods the two approaches use to reach that end is rhetorical. What distinguishes the approaches substantially is the values from which their arguments proceed (even if their arguments suggest that the values are distilled from the rules and governing principles rather than discovered a priori). A question presented when considering the extant constructions of Contract theory, then, is whether one approach to identifying the values that animate Contract is more fundamental, more essential than the other.

Farnsworth’s Regret provides a context within which to reach some conclusions about the current state of Contract “science” and the prospects for Contracts jurisprudence in the future. An understanding of the relationship between Farnsworth’s method and that of Fuller will support comparison of their approach with the approach of other theorists.

A. FULLER AND FARNSWORTH

Fuller and Perdue’s Reliance Interest article has determined a good deal of the course of Contract theory since its publication in 1936. The article’s delineation of the expectation, reliance, and restitution interests has informed

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22. Cf. FARNSWORTH, supra note 8, at 204 (“Not only is the reliance principle now seen as a compelling reason for enforcing promises . . . and a basis in its own right for doing so . . . , but it is also recognized as the chief justification for the assent rule, which serves as its surrogate.”) (emphasis added); Fuller & Perdue, supra note 17, at 52 (“For example, one frequently finds the ‘normal’ rule of contract damages—which awards to the promisee the value of the expectancy, ‘the lost profit’—treated as a mere corollary of a more fundamental principle, that the purpose of granting damages is to make ‘compensation’ for injury.”) (emphasis added) (citing 3 SAMUEL WILLISTON, CONTRACTS § 1338 (1920)).

23. See, e.g., Fried, supra note 4; Barnett, supra note 4; Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976).

24. See, e.g., Craswell, supra note 12; Eisenberg, supra note 19; Goetz & Scott, supra note 5.

25. See Fuller & Perdue, supra note 17. Perdue was Fuller’s research assistant. For the sake of clarity, and without doing too much attributional mischief, hereinafter the article and arguments in it will be described as Fuller’s. See generally William R. Perdue, Jr., Commentary, 100 Yale L.J. 1487 (1991).

26. See Craswell, supra note 12, at 3 (acknowledging that “especially the organization of contracts textbooks . . . continue to assign a central place to Fuller and Perdue’s classification”).
Farnsworth's understanding of the Contracts law, at least to the extent that is revealed in his Contracts casebook. But the argument here is not that Farnsworth in *Regret* has subscribed to or even applied the Fuller interest analysis. Instead, the object of this inquiry is to discover the fundamental affinity that connects the Farnsworth and Fuller analyses. That discovery would then accommodate comparison of the Farnsworth and Fuller heuristic with alternative perspectives in order to reveal something about the course of Contract "science."

Succinctly, Fuller explains that Contract damages rules and principles are concerned with vindicating three "interests": (1) the expectation interest—the promisee's realization of the benefit of his or her bargain; (2) the reliance interest—the promisee's recovery of out of pocket loss occasioned by the promisor's breach; (3) and the restitution interest—the promisee's right to collect from the breaching promisor any value conferred on the promisor by the promisee.

After surveying the normative bases for the law's protection of the expectation interest, Fuller observes:

> The inference is therefore justified that the ends of the law of contracts and those of our economic system show an essential correspondence. One may explain this either on the ground that the law ... reflects inertly the conditions of economic life, or on the ground that economic activity has fitted itself into the rational framework of the law. Neither explanation would be true. In fact we are dealing with a situation in which law and society have interacted. The law measures damages by the expectancy in part because society views the expectancy as a present value; society views the expectancy as a present value in part because the law ... gives protection to the expectancy.


28. Though, in fact, it is clear that Farnsworth subscribes to Fuller's conclusions ("For me, the most satisfying answer is still the one proposed by Lon Fuller more than fifty years ago: 'To encourage reliance we must ... dispense with its proof.'"). See Farnsworth, *supra* note 16, at 57 (citing Fuller & Perdue, *supra* note 17, at 62).

Farnsworth spends some time developing an "assent rule," which he describes as a surrogate for the reliance principle. See Farnsworth, *supra* note 8, at 61-64. Apart from curiously confusing the principle/rule dichotomy, it is difficult to appreciate how the assent rule surrogate does any more than reinforce Farnsworth's conclusion that courts will sometimes reach a reliance-based result without proof of actual reliance. See id. So understood, the assent rule is a surrogate for the reliance principle for the same reason that courts award expectation damages for breach of reciprocal promises: because proof of actual reliance is hard to come by and expectation damages provide at least a clear if only roughly accurate measure. At bottom, the principle or rule is a close enough response to what is essentially an evidentiary problem.


30. Id. at 63. That explanation of the expectancy measure operates in tandem with and not in place of Fuller's observation (adopted by Farnsworth, *supra* note 8) that "[t]o encourage reliance we
So, for Fuller, then, damages for breach of contract should track the interest compromised by the breach. Violation of the expectation interest supports the award of expectation damages. Reliance and restitution damages, in turn, provide the appropriate measure of relief when each of those interests, respectively, is compromised by the promisor’s breach.

Fuller uses that “interest analysis” ultimately to demonstrate that the reliance interest is the primary focus of Contract, and provides the damage measure with which courts are most comfortable. That conclusion, and its ramifications for the Contract pedagogy, is asserted succinctly in the closing pages of the second installment of the Reliance Interest article:

The cases discussed in this installment show, we believe, that the contractual reliance interest receives a much wider (though often covert) recognition in the decisions than it does in the textbooks. There can be little question that this judicial recognition would be much enlarged if the textbooks were to abandon their present treatment of contract claims (“all or nothing”) in favor of an analysis in terms of the distinct contract interests such as is proposed here. 31

Though it is impossible to do justice to the depth of Fuller’s article in a recapitulation as brief as the foregoing, for present purposes it suffices to maintain focus on Fuller’s “scientific” method rather than his argument to develop an understanding of Farnsworth’s “science,” to the extent that it is derivative of Fuller’s.

must . . . dispense with its proof.” Fuller reprises that point with regard to cases of unjust enrichment, after noting instances in which courts award expectation damages to redress unjust enrichment:

Various explanations may be given for this apparent discrepancy between the conditions under which liability was imposed (unjust enrichment) and the terms of the liability itself (expectancy). Even if it were granted that the sole purpose pursued by the courts was the prevention of unjust enrichment it would be possible to regard the promised price as the most obvious and most simple method of measuring the extent of that enrichment, particularly in an age which veered away from any kind of legal relief which involved estimation. If this is the proper explanation for the measure of damages in real contracts we have in them an illustration of the divergence of measure and motive; or, to speak with less attempt at epigram, a case where though the fundamental motive was prevention of unjust enrichment the court was moved to substitute for the measure which that purpose would normally dictate a simpler and more easily administered measure.

Fuller & Perdue, supra note 17, at 67-68. That perspective retains currency for those who pursue positive economic analysis to the present day. Consider the Goetz and Scott conclusion: “In sum, the administrative and error costs of attempting to apply a theoretically optimal net reliance standard suggest that it may be worthwhile to adopt a surrogate measure that is cheaper to apply.” Goetz & Scott, supra note 5, at 1290.


32. Fuller invokes, at the outset of his Reliance study, Nietzsche’s observation that “[t]the most common stupidity consists in forgetting what one is trying to do” and notes “discomforting relevance” of that observation “to legal science.” Fuller & Perdue, supra note 17, at 52.
In place of Fuller’s analysis of Contract by reference to “interests,” Farnsworth analyzes Contract rules relating to regretted decisions by monitoring the courts’ (and, to a lesser extent, the legislatures’) consistent and inconsistent recognition of six fundamental principles. He defines each as follows:

**The Reliance Principle:** “A promisee’s reliance on a promise results in commitment on the part of the promisor.” Farnsworth concurs with Fuller that reliance is “now seen as a compelling reason for enforcing promises . . . and a basis in its own right for doing so.” The fact that Farnsworth reaches the same conclusion with regard to reliance as did Fuller before him does not diminish Farnsworth’s argument. If Fuller is correct, then Farnsworth would err if he did not reach the same conclusion. The fact that the two scholars get to the same place by more or less the same means, however, does confirm the substantial identity of their two perspectives.

**The Intention Principle:** Farnsworth spends a good deal of time on the intention principle, whose demise he bemoans particularly with regard to the abolition of the seal. In order to protect the interests of those who want to make gifts (“promisors in nonreciprocal exchanges”), Farnsworth would revive the seal and in so doing throw off the shackles of paternalism. And it is indeed, for Farnsworth, paternalism that provides the only explanation for the law’s abrogation of that simple but effective formality.

**The Dependence Principle:** Though he recognizes the affinity between the dependence principle and the contract reliance principle, Farnsworth finds the substance of the dependence principle in the tort law, “though it might be preferable to assign a relational basis.” It is treated in Regret in order for Farnsworth to pursue a line of inquiry that distinguishes the book from the

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33. Farnsworth, supra note 8, at 2-3.
34. Id. at 204.
35. See id.
36. This is the term used by Goetz and Scott to distinguish gift promises from promises supported by consideration. See Goetz & Scott supra note 5, at 1276-83.
37. Farnsworth writes:

I use the term ‘paternalism’ broadly to include limitations that the law imposes on a person’s control over the future for that person’s own good, usually in the context of the extent of a person’s freedom to make a commitment that will be irrevocable or a relinquishment or preclusion that will be irreversible. This is consistent with Mill’s use of the term in his example of selling oneself into slavery.

Farnsworth, supra note 8, at 207 n.5. For the most part, Farnsworth does not offer a trenchant critique of paternalism, failing to distinguish proper uses from improper abuses of a paternalistic disposition. But that type of inquiry, though it might be interesting, would in any event not be central to Farnsworth’s use of paternalism as a tool to explain the diminishing prominence of the intention principle in Contracts. It would, nonetheless, have been productive for Farnsworth to explain what limits, if any, his public interest principle would impose on paternalism. Is paternalism in the public interest? To what extent? And when would it collide with Farnsworth’s other principles?

38. See Farnsworth, supra note 8, at 89-96. The examples upon which Farnsworth relies involve aborted efforts to rescue a drowning swimmer and the imposition of a support obligation on a stepfather.
39. Id. at 96.
contributions of many other Contracts commentators. Recall, the author's focus is "The Law of Regretted Decisions," wherever that may be found, and not just in the Contract law.

The Anti-Speculation Principle: Farnsworth reveals the operation of this principle in the case of one who has reached the age of majority but who as a minor entered into a contract that is voidable, and in the case of a victim of fraud who may either avoid the fraudulent contract or choose to give it effect. Farnsworth reports that Contract requires the party at whose instance a contractual obligation is voidable to make a decision expeditiously and not speculate at the expense of the other party. That reluctance to let one party "play the market" is the basis of the anti-speculation principle.

The Public Interest Principle: This may be the most amorphous of the six principles; its foundation and scope are not certainly discernible. The basis and operation of the public interest principle are in the adjective law regulating the conduct of litigation. Discussion of the principle is not pertinent to the appreciation of Farnsworth's Contract "science" explored in this essay.

The Repose Principle: This principle, too, operates in the litigation context and explains preclusion on account of the passage of time. As such, it is not a Contract principle, but it instead works in tandem with the public interest principle to vindicate interests not peculiar to the law of consensual relations.

For purposes of the instant inquiry, then, focus is best concentrated on the relationship between Farnsworth's reliance and intention principles and Fuller's description of the cooperation of the three basic Contract interests: expectation, reliance, and restitution.

According to Fuller, the primacy of the reliance interest explains courts' awarding damages on a reliance basis more often than the general expectation damages rule would predict. He uses the normative observation that reliance is more fundamental than expectation to support his conclusion that a careful reading of the cases demonstrates the limited instances in which Contract doctrine serves an unalloyed expectation interest. Indeed, Fuller acknowledges early in his argument that "it is impossible to assume that when a court enforces a promise it necessarily pursues only one purpose and protects one 'interest,' or

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40. For another effective treatment of Contract principles across doctrinal lines, see, for example, Trebilcock, supra note 3, at 213-40 ("The Basic Theory of International Trade").
41. See Farnsworth, supra note 8, at 184-85.
42. See id.
43. See id. at 188-92.
44. See id. at 194.
45. See id.
46. Fuller's normative analysis relies in the first instance on Aristotelian distinctions between corrective justice and distributive justice. See Fuller & Perdue, supra note 17, at 56. Fuller summarily concludes that the restitution interest is more deserving of protection ("presents the strongest case for relief") than is reliance and that reliance is more deserving than expectation. See id.
that the purpose or interest which forms the rationale of the court’s action necessarily furnishes the measure of the promisee’s recovery.”

Fuller does assert that the three interests are fundamental, and therefore inviolable. So whatever the particular court’s conclusion with regard to a non-breaching party’s cause of action or the damages awarded on account of the breach, the Contract law recognizes one or more of those three interests.

Farnsworth’s interposition of six principles and his explicit recognition of their cooperation in some contexts echoes the Fuller perspective without tracking the earlier commentator’s thesis too closely. Farnsworth’s principles are a closed set, not just insofar as the Contract law is concerned, but also insofar as all the law of regretted decisions is concerned. Even focusing solely on the principles directly apposite to Contract—the reliance, intention, and anti-speculation principles—that those principles should explain all of Contract law just as, for Fuller, the expectation, reliance, and restitution interests explain all of Contract damages law.

The object here is not to reach a conclusion about whether either Farnsworth or Fuller “got it right.” Debate about whether Fuller’s interests or Farnsworth’s principles provides the better explanation for all of Contract is outside the scope of this inquiry.

Both Fuller and Farnsworth posit conceptual units (for Fuller, “interests,” for Farnsworth, “principles”) and, though there is probably not substantial identity between those conceptual units, each commentator uses his framework to support a critique of Contract rules. Further, though both commentators labor at the intermediate level of principles, neither spends very much time at all at the more fundamental level of inquiry concerning values. Fuller, as noted, introduces Aristotelian conclusions briefly at the outset of his argument. Farnsworth’s treatment of the normative is even sparser, offering no more than the passing reference to what is “fair.”

It is, however, difficult to conclude that Farnsworth tells us any more than did Fuller about the interrelation of principles; in fact, he tells us less. The strength of both arguments is probably to be found in the catalogue that each provides at the intermediate level of analysis. Both scholars help us to understand why the

49. For example, in offering a justification for statutes of limitations, Farnsworth explains that “both the repose principle and the public interest principle support preclusion based on the passage of time.” Farnsworth, supra note 8, at 194.
50. See supra text accompanying notes 33-37, 41-42.
51. There is, certainly, some coincidence between Fuller’s reliance “interest” and Farnsworth’s reliance “principle,” and perhaps even some congruence between Fuller’s expectation interest and Farnsworth’s intention principle, but the instances and extent of that coincidence are not crucial to the observations offered here.
52. See supra text accompanying note 46.
53. Consider, for example, in support of the anti-speculation principle: “It would be unfair to allow the injured party to wait and see how things turned out—even if the other party has been guilty of fraud—and only then decide whether to put an end to the relationship.” Farnsworth, supra note 8, at 185 (emphasis added).
rules look the way they do and why some of the rules should look other than they do, but neither Fuller nor Farnsworth gets us very close to an understanding of the antecedents to principles.

To appreciate Regret's place in the Contracts constellation, it is not enough to trace the work's progeny. It is also necessary to discern the fit between Farnsworth's method and the method of what Professor Randy Barnett describes as the "post-Realist" generation of legal theorists.

B. THE "GENERATIONAL SHIFT"

In his recent review of Robert Hillman's Contracts monograph, Barnett distinguishes the jurisprudential method of two "generations" of legal scholars: "the generation of legal academics that was taught by the vanguard of 'realist' professors, and the generation whose scholarship came to be called 'legal theory.' " The accuracy of Barnett's characterization is not as important here as is his conception of the substantial difference between the two generations' methodology and conclusions.

Both the "Neo-Realists" and the "Legal Theorists" are interested in providing jurisprudential conclusions that enhance the "certainty and predictability" of the law. So any conclusion about the relative efficacy of the two approaches may have something to say about the utility of each so far as achieving that certainty and predictability is concerned. What emerges, however, is not so much a comparison of the relative advantages with regard to prediction of two different paradigms, or even two different perspectives. Instead, we discover no more than two ways to state the same thing, two ways to present legal inquiry at the same jurisprudential level.

On the one hand, consider that approach A, the Neo-Realist approach, for example, asserts that legal principle X operates when conditions 1 through 4 (or, for that matter, 1, or 2, or 3, or 4) are satisfied. Approach B, on the other hand, "Legal Theory," explains that principle X operates when the essence of conditions 1 through 4 (or 1, or 2, or 3, or 4) is satisfied. To explain the essence of principle X the Neo-Realist will offer examples drawn from the sample 1

55. Id. at 1414.

Curiously, in the discussion of Uniform Commercial Code section 2-207 (the "Battle of the Forms" provision of the "Sales" article), the White and Summers treatise observes, parenthetically, that "we realize that those who can analyze, do, and those who cannot, number." JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 31 (5th ed. 2000).
through 4 and would likely not find it worthwhile to generalize from the particular examples. To demonstrate the operation of principle X, the “legal theorist” will necessarily rely on the same examples. So the predictive power of either approach will rely on the same level of jurisprudential inquiry. The quibble between the two schools is no more than a disagreement about what level of abstraction is pedagogically more effective. And does not the resolution of that disagreement turn more on theories of learning than jurisprudence?

Fuller and Farnsworth, though not really contemporaries, certainly share a common jurisprudential legacy; both would fall neatly into Barnett’s Neo-Realist school. But both also demonstrate a preoccupation with “legal theory,” in the Barnett sense. So, to appraise the contribution of Farnsworth’s monograph to a Contract “science,” it is helpful to appreciate Regret’s accommodation of realism and theory.

Farnsworth distills six principles from the cases. He surveys what Llewellyn might have termed “trouble-cases” and identifies the principle that animates the court’s resolution of the controversy before it. For example, in order to support his conclusion that the reliance principle cooperates with an assent rule, Farnsworth analyzes the case of Lucy v. Zehmer and concludes that “[a] bright-line rule based on assent, it turns out, both protects expectation and at least covertly recognizes reliance.” Fuller’s extended analysis of Hadley v. Baxendale, though more sustained and exhaustive than Farnsworth’s case law analysis, is another example of the same process: distillation of fundamental principle from case law, then demonstration of that principle’s operation in other contexts.

The “science” of Farnsworth—and Fuller, for that matter—entails discovery of principle from primary sources. Farnsworth does not simply list considerations that determine application of the principle, though it is not clear that had he done so, his level of jurisprudential inquiry could have been faulted as less significant. Statement of principle and listing factors pertinent to application are part and parcel of the same jurisprudential level of inquiry. It is difficult to see how one is more fundamental than the other.

Therefore, any asserted dichotomy identified as indicative of a generational difference is ultimately a false dichotomy. It takes us no closer to an appreciation of different Contract “science” paradigms. It does not cast much light on the crises confronting Contract, and so does not merit further attention. We must

59. FARNSWORTH, supra note 8, at 58.
61. After discovering the Reliance Principle’s surrogate, the assent rule, in Lucy, Farnsworth finds three other examples of the assent rule in action: contract repudiation, contract beneficiaries, and good faith purchases. See FARNSWORTH, supra note 8, ch. 6.
62. Farnsworth also relies on the Restatement (Second) of Contracts, see, e.g., FARNSWORTH, supra note 8, ch. 6 nn.20-22, and the Uniform Commercial Code, see e.g., FARNSWORTH, supra note 8, ch. 6 n.27.
look elsewhere to appreciate the limits of contemporary Contract "science." But first it is worthwhile to take stock of where the Farnsworth/Fuller perspective takes us, and where it has left us.

C. DESPAIR

Relying on the Values – Principles – Rules trichotomy to distinguish levels of jurisprudential inquiry and concluding that Farnsworth focuses on the level of principle raises the following questions: Does analysis at the level of principle have anything to say about the relationship between values and principles? What is the nature of values that would distinguish inquiry on that level from inquiry at the level of principles? Does Contract "science" require inquiry at the level of values in order to reach reliable conclusions about principles and rules? We could, of course, pose more questions to determine the state of Contract "science" and Regret’s place in it, but the foregoing adequately fixes a worthwhile point of departure.

1. The Relationship Between Values and Principles

Insofar as actions speak louder than words, you could rely on parties’, including courts’, responses to recurring transactional patterns (the rules of decision) to learn something about the principles that inform their resolution of controversy. That is the method both Fuller and Farnsworth use to distill principles from rules. But could you, in turn, distill the values that animate those principles from a survey of the principles themselves? That is, can we find in the reliance principle and intention principle some common animating value? Fuller does not conscientiously pursue that object in his comparison of the reliance and expectation interests, though he does note the interdependence of

63. If the Summers/Burton or Barnett/Hillman differences discussed above concerned different levels of jurisprudential inquiry rather than the form that inquiry at the level of principles should take, the development and appreciation of Contract "science" would benefit more from the tension between the two approaches. See supra text accompanying notes 54-56. It is difficult, however, to conclude that the distinction drawn by Barnett in his assertion of a "generational" divide resonates on that level. Barnett quotes Burton at length:

We want our language to call our attention to the facts that matter—those that legitimately establish similarities with or significant differences from the precedents . . . . We want to know which facts shall count for more than their truth because they are legally significant.

Language can perform this function in a number of ways in addition to "positive definitions." Professor Summers' preference for 'lists of factors generally relevant to the determination' favors one form that could be employed, in theory . . . . A second form that could be employed, however, is the general description or model—a simplified representation of a complex reality . . . . Unlike most lists of factors, the general description technique encourages us to focus on complex webs of relationships among facts.

Barnett, supra note 6, at 1416 (quoting Burton, supra note 56, at 509-10). So, Burton’s own terms confirm that the contrast between the Neo-Realist and Legal Theory approaches is a matter of language and rhetorical technique rather than a matter of differing levels of jurisprudential inquiry.

64. See supra text accompanying notes 57-62.
the two. 65 Farnsworth also is satisfied describing where reliance ends and
intention begins, and does not endeavor to find the common source of the two
interests. For Farnsworth, reliance and intention are independent bases from
which to find commitment. He neither tells us why the law enforces commit­
mments nor identifies anything in the reliance and intention interests that inti­
mates a priori values. 66 Indeed, Farnsworth provides no hint that principles are
the product of antecedent values.
Though it may be that the current state of Contract “science” provides us the
means to discover values in the course of a survey and study of principles,
Farnsworth’s Regret does not operate on that plane. That is not to say that
Farnsworth does not make an important contribution to Contract “science,” but
the conclusion does provide us the means to better appraise the place of Regret
in Contract “science.”

2. Values and Principles Distinguished

There are at least two reasons why it is difficult to discover values. First, the
limits imposed on intellectual perception may obscure inquiry on too fundamen­
tal a level. That is the perception dilemma. 67 Second, to the extent that values
are only revealed in responses to recurring interreactional contexts, the variety
of contingent experiences and reactions to interreactional contexts may present
insurmountable obstacles to consensus. Though there may seem to be a shared
understanding and appreciation of a fundamental value, the constituent bases of
consensus may be different in ways that matter in some but not other contexts.
That is the consensus dilemma, 68 which would be revealed to the extent that the
same statement of values generates different principles for different actors (and,
in turn, different rules).

65. See Fuller & Perdue, supra note 17, at 63.
66. Fuller’s study may at least acknowledge a level of inquiry that Farnsworth ignores with regard to
intent and reliance principles when Fuller admits that courts may pursue more than one of the interests
in the course of a single adjudication. See Fuller & Perdue, supra note 17, at 66. Farnsworth depicts his
principles as mutually exclusive. See FARNSWORTH, supra note 8, at 164-65.
67. This is akin to the type of experimental limitations that confound physicists’ pursuit of “string
theory” to find the unifying force:

Without monumental technological breakthroughs, we will never be able to focus on the tiny
length scales necessary to see a string directly. Physicists can probe down to a billionth of a
billionth of a meter with accelerators that are roughly a few miles in size. Probing smaller
distances requires higher energies and this means larger machines capable of focusing that
energy on a single particle. As the Plank length is 17 orders of magnitude smaller than what
we can currently access, using today’s technology we would need an accelerator the size of
the galaxy to see individual strings.

Greene, supra note 2, at 215.
68. To suggest that the bases for consensus with regard to values may be difficult, even impossible in
some cases to realize, is not to say that the values that support particular principles may not be
discovered. There is no reason to believe that an idea is not a value—does not operate at that most
fundamental level of inquiry—just because there will be disagreement about that value. Indeed, it is the
battle between, perhaps among, competing values that determines the elaboration of principles and the
formulation of rules therefrom.
Those two obstacles to the discovery and identification of values provide the means to distinguish values from principles in the Contract “science.” To the extent that either the perception or consensus dilemma could frustrate the formulation of a generalization from the operation or cooperation of legal principles, the generalization describes, or seeks to describe, a value—something more fundamental than a principle.

Farnsworth explains the operation of the reliance and intent principles in Contract, but he does not suggest why the law should vindicate reliance or intent. We can realize ourselves that some forms of reliance and some forms of intent justify the conclusion that there is a commitment. And, we know that others would disagree with us from one instance to the next about the types of reliance and intent that should support commitment. If we have difficulty answering the question “Why commitment?” in a particular context, that difficulty may be attributed to our inability to formulate a coherent and comprehensive concept of commitment, the type of intellectual obstacle described by the perception dilemma. However, we may also conclude that though some number of us may share a sufficiently common understanding of the commitment concept to support generalization, differences in the way that we appreciate the contours of the commitment concept may be revealed when we apply it to particular applications of the reliance and intent principles, such as the consensus dilemma.

In order to follow Farnsworth, we must allow that we have identified a form of reliance or an instance of intent that does in fact give rise to commitment. But it is the concept of commitment and the value to which that concept gives effect that is antecedent to reliance and intent. And, we know that value is distinct from its elaboration in the reliance and intent principles because we lack the means to fix it certainly in light of the perception and consensus dilemmas. It is, then, and perhaps cruelly, the ultimate “unknowability” of the value that marks its relation to Contract principles in the current state of Contract “science.” That provokes despair, but it may also be the type of crisis that spurs development of new Contract theory.

3. The Value of Values

Identification of the value or values that ultimately support Contract is the Holy Grail. There seems to be a persistent sense that if we were but able to

69. See Kuhn, supra note 11, at 68, 76. Kuhn notes:
Failure of existing rules is the prelude to a search for new ones . . . . So long as the tools a paradigm supplies continue to prove capable of solving the problems it defines, science moves fastest and penetrates most deeply through confident employment of those tools. The reason is clear. As in manufacture so in science—retooling is an extravagance to be reserved for the occasion that demands it. The significance of crises is the indication they provide that an occasion for retooling has arrived.

Id. at 68.

70. And the search for the single unifying theory may be no more fruitful, or so Professor Richard Craswell has recognized:
find the common denominator that explains why the law enforces some promises but not others, we would have discovered an invaluable tool. The value of discovering the fundamental values then, is in the use to which we could then put that tool. We would be able to measure not just the efficacy of specific Contract rules by reference to those values, but we could certainly formulate the principles revealed by those rules. Values, correctly conceived, would provide the ultimate measure of rules and the guide to reformulate rules that are inconsistent with those values.

It would not be enough to identify the principles that have informed the promulgation of rules. Though that would afford us the means to appraise the fitness of rules by reference to their animating principles, it would not tell us whether our rules in fact vindicate the values that essentially explain why we enforce some promises. If we are not able to test our rules in that way, application of the rules may in some contexts—and for reasons unrelated to process—undermine rather than serve the object of Contract.

Commentators have invested considerable energy in trying to identify the value or values that animate Contract. And there has been no shortage of commentators who have either concluded that there is no single Holy Grail or that the cups offered so far have been inauthentic. For present purposes it is not necessary to resolve those disagreements, or to choose from among the extant unifying theories. The object here is only to infer what we can about the state of Contract “science” from the role that the values and the search for them play in the heuristic method.

What is intellectually tantalizing, and what provides the impetus for inquiry at the level of values, is the great success we have enjoyed making sense of

Thus, ethical theories about what kind of promises to make usually derive from theories about the particular subject matter of the promise (helping the poor, etc.). They do not derive from theories about promising as such.

The same could be true ... concerning the ethical consequences of having made a promise. That is, there would be nothing illogical in believing that the conditions under which it is excusable to break a promise to the poor have no connection (in the sense of being linked by any common theory) with the conditions under which it is excusable to break a business promise, or a promise to a friend. If that were the case, there would be no point in asking questions about the nature of the commitment represented by promises in general. One could speak of the commitment represented by charitable promises, or business promises, but it would be useless to search for any general, unifying theory of promises.

Craswell, supra note 1, at 492. Craswell’s inquiry then turns to a study of the unifying theories that have sought to explain Contract and measures the efficacy of each in terms of the development of default rules that would proceed from the unifying theory (fundamental values) posited. See id. at 516-28 (reviewing the work of Charles Fried and Randy Barnett and finding that the unifying theories offered by each commentator fail to instruct with regard to default rules).

71 See, e.g., sources cited supra notes 4-5. There are, of course, additional examples. To some extent, many philosophers who have concerned themselves with values in any context have necessarily reflected on the considerations fundamental to Contract. In that more ambitious vein, see, for example, JOHN RAWLIS, A THEORY OF JUSTICE (1972); J. Raz, Promises in Morality and Law, 95 HARV. L. REV. 916 (1982).

72 See, e.g., Barnett, supra note 6; FARNSWORTH, supra note 8, at 37.
rules in terms of their animating principles. Further, the fact that we have been able to discover principles in the formulation and operation of rules holds the promise that we could discover values in the cooperation of principles. Similarly, if we find that there is a discontinuity in the cooperation of our principles—say, economic efficiency and individual autonomy—73—or in the elaboration of those principles in the rules they support, then we may have discovered the crises that signal the need for a new paradigm. But we may only find the means to redress the deficiency in that fit between principles and rules if we can discover the discontinuity between the principles and the values they animate. That is, we may better understand principles and the operation of rules once we understand the values that inform them.

From those premises, inquiry at the level of values is important not just because it is worthwhile to reveal what expression of fundamental values would reveal for its own sake, but because the exercise of inquiry at that a priori level can increase, or diminish, our confidence in the rules that govern daily interactions.

One of the most effective studies of the relationship between Contract values and Contract rules is Professor Richard Craswell’s article exploring the relationships among Contract Law, Default Rules, and the Philosophy of Promising.74 The strength of that inquiry is in its inexplicit demonstration of the disjunction between asserted fundamental Contract values and extant Contract rules. That is, Craswell tests the efficacy of Charles Fried’s75 and Randy Barnett’s76 Contract meta-theories by investigating those theories’ ability to account for existing Contract rules and predict the rules’ application.77 Ultimately, Craswell finds that Fried’s and Barnett’s approaches are not worthwhile, and it is difficult to fault Craswell’s conclusion.

Craswell’s study is important for what it says about the fit among the elements of the Values – Principles – Rules trichotomy generally. Craswell does not scrupulously recognize the three distinct levels of inquiry—how values are antecedent to principles, which are, in turn, antecedent to rules. In fact, he confuses the levels of inquiry by listing “economic efficiency” among the “theories that justify the enforceability of promises.”78 It might be more accurate to describe “economic efficiency” as the principle flowing from the values that comprise Utilitarianism.79 The distinction is an impor-

73. See infra notes 79-80 and accompanying text.
74. Craswell, supra note 1.
75. Craswell describes Fried’s conclusion as championing “individual freedom and autonomy.” Id. at 490.
76. Craswell describes Barnett’s theory of Contract as “the promisor’s consent to the transfer of part of her bundle of property rights.” Id. at 497.
77. Craswell is concerned with default rules particularly, but his method would be no less valid were asserted theories of fundamental values measured by reference to other types of Contract rules, such as the Contract formation rules that are the focus of so much of Regret.
78. Craswell, supra note 1, at 490.
79. For a recent survey of pro- and anti-utilitarian theories, see UTILITARIANISM AND BEYOND (Amarty A. Sen & Bernard Williams eds., 1982). It should be noted that the whole study of welfare economics is
tant one for the appreciation of a Contract "science." A comparison of values with principles (utility with economic efficiency) will tell us something about whether the elaboration of the value at the level of principle is assailable. However, it will not provide a true means to compare competing value systems if what we are comparing is values with principles, rather than values with values.

While Craswell's critique of Fried and Barnett is trenchant because he correctly understands those two commentators to be writing at the level of values, similar analysis of other work—work that proceeds on the level of principles as though it purported to operate on the level of values—would be misguided. In fact, Craswell makes just that error when he launches an attack Against Fuller and Perdue. Insofar as Farnsworth's Regret proceeds at the same level of inquiry as does Fuller, an appreciation of Craswell's error as far as Fuller is concerned tells us something about the Contract "science" of Farnsworth as well.

II. A JURISPRUDENCE OF PRINCIPLES

Craswell's thesis is that Fuller's Reliance article has misdirected the course of meaningful Contract study (and "science") by focusing attention on three "interests" rather than the constituents of the damages that courts award in Contract cases. Craswell posits the disjunction between Fuller's level of abstraction and modern normative and descriptive analyses. In his critique of Fuller's normative premises and contributions, Craswell describes the Reliance article as offering an incomplete analysis of the values operating in the contracts damages cases; in his critique of the descriptive contribution of the article, Craswell finds that the expectation, reliance, and restitution categories lack precision that would advance Contract theory and the understanding of contract damages issues.

Craswell's conclusions, though addressed directly to Fuller's Reliance article, provide a gloss on Farnsworth's analysis and assertions in Regret as well. To the extent that there is identity between the Fuller and Farnsworth approaches, the bases of Craswell's critique of Fuller would pertain to Regret. By the same token, to the extent Fuller survives Craswell's critique, Farnsworth's contributions may be more apparent as well.

largely founded on utilitarian ideas. Lord Lloyd of Hamstead & M.D.A. Freeman, Lloyd's Introduction to Jurisprudence 207 n.13 (5th ed. 1985). Jeremy Bentham's formulation of utilitarianism still retains currency. Bentham espoused "the principle of the greatest happiness of the greatest number, and sought to make himself the Newton of the legal and moral world by establishing the principles of an experimental science governing that sphere, much as Newton had formulated the fundamental laws of the physical world." Id. at 248.

80. Craswell, supra note 12.
81. See id. at 11-54.
82. See id. at 54-80.
A. THE RELATIONSHIP AMONG PRINCIPLES

Recall that Fuller describes three “interests” served by the Contract damages law: the expectation, reliance, and restitution interests. Generally, the expectation damage measure would provide the greatest recovery to the non-breaching party and the restitution measure would provide the least. Reliance, the measure that would most often provide the promisee-plaintiff more than the restitution measure but less than the expectation measure, is the interest that Fuller’s study determines to be most often vindicated in the case law. The innovation of Fuller’s article is in its response to the Formalistic conclusion that Contract, in the normal course, awards damages based on the expectation interest. Fuller demonstrates that even the expectation measure itself is merely a response to the evidentiary obstacles to establishing the extent of reliance in dollar terms.

Farnsworth’s delineation of Contract principles in *Regret* does not endeavor to identify the bases of Contract damages rules and distill from them the animating interests. Fuller had already done that—and in terms that Farnsworth could endorse. Instead, Farnsworth’s object is to describe the reasons, at the level of principle, that courts enforce some promises and refuse to enforce others. Farnsworth’s inquiry is related to Fuller’s, but does not trace the same ground.

To come to terms with the difference in the two commentators’ foci, it is important to appreciate the limits of their respective inquiries. It would be unfair in the case of Fuller to conclude that he is offering a comprehensive normative Contract theory. And, it would be wholly incorrect to accuse Farnsworth of any normative argument at all. While Fuller does begin his article with reference to the relationship between Aristotelian senses of justice and Will theory and the expectation interest and economic theory, the references are not intended to argue that Fuller’s three interests are revealed in the elaboration of those normative perspectives. In fact, Fuller’s discussion of Aristotelian ethics is designed merely to present the argument that the restitution and reliance interests could be deemed deserving of greater protection than the expectation interest in those ethical systems that subscribe to distinctions between corrective and distributive justice. Fuller’s

83. See *supra* text accompanying notes 27-30. The expectation measure would award the plaintiff the benefit of his or her bargain; the reliance measure would award the plaintiff the amount of expenditures incurred in reliance on the promise (akin to tort “out of pocket” damages); and the restitution measure would provide the promisee an amount equal to the breaching promisor’s unjust enrichment, the benefit realized by the promisor as a result of the non-breaching promisee’s performance.

84. See Fuller & Perdue, *supra* note 17, at 67-68.

85. Craswell notes that Farnsworth has written that the three interests listed by Fuller are “the only choices for compensatory damages.” Craswell, *supra* note 12, at 55 n.117 (citing E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 Colum. L. Rev. 1145, 1147-49 (1970)).

86. See Fuller & Perdue, *supra* note 17, at 56.

87. See id. at 58-59.

88. See id. at 63.
brief treatment of that perspective militates against finding that his descriptive analysis, how the reliance interest in fact explains the case law, is dependent on any normative conclusions. Nevertheless, Craswell observes:

Of course, Fuller and Perdue's descriptive analysis was reinforced by their normative argument (and vice versa). That is, decisions protecting the reliance or restitution interests look more significant, and less like aberrations, once we are persuaded that there are also normative reasons why courts might justifiably protect the reliance or restitution interests rather than the expectation interest. Similarly, once we have been made to see that courts often do protect the reliance or restitution interests, the normative claim that they ought to protect those interests gains plausibility. 89

Therefore, it is Craswell's conclusion that Fuller posits the normative in The Reliance Interest that supports Craswell's conclusions about the normative basis of Fuller's interests. 90

Because it is not clear that Fuller is concerned with law at the level of values, it is not at all clear that a critique of the normative "argument" of Fuller's article is worthwhile. But, even assuming, for the moment, that Fuller has offered a normative framework, or even incidentally suggested the relationship between values and principles, his contribution to the law and the literature of Contract would not be diminished so long as his description of the principles that informed damages rules and the relationship between those principles and rules was trenchant.

Farnsworth, in Regret, really offers no argument at the level of values and, in fact, suggests that he would find such argument unavailing to the extent that it sought the single, fundamental, unifying normative precept of Contract liability. 91 In that regard, then, Craswell's critique of what he infers is Fuller's normative argument would find no purchase in the substance of Farnsworth's argument.

So, it suffices to plead "no contest" on behalf of Fuller (and incidentally Farnsworth) to Craswell's charge that analysis of expectation, reliance, and restitution interests—or, for that matter, intention and reliance principles—does not directly contribute to inquiry at the level of values. Craswell does not suggest that normative analysis would be ultimately unavailing; instead, he

89. Craswell, supra note 12, at 8. Craswell acknowledges that Professor Todd Rakoff's article offers a more "subtle discussion" of that aspect of the Reliance article. See id. at 9 n.19 (citing Todd D. Rakoff, Fuller and Perdue's The Reliance Interest as a Work of Legal Scholarship, 1991 Wis. L. Rev. 203, 223, 225-45). Professor Rakoff's article mines The Reliance Interest as well as other articles written by Fuller before and after The Reliance Interest to formulate Fuller's normative posture and its relationship to his description of the courts' treatment of contract damages.

90. Craswell acknowledges that Fuller only "sketched" and did "not develop at any length" the corrective justice normative argument. See Craswell, supra note 12, at 32.

91. See supra text accompanying note 10.
simply concludes what Fuller (and Farnsworth) would concede: The distillation of principles from rules does not support a normative theory of Contract.\textsuperscript{92}

The failure of Craswell to appreciate that analysis on the level of principle may be worthwhile irrespective of inquiry regarding the fit between values and principles represents a failure to appreciate the Values – Principles – Rules trichotomy. Once Contract “science” is understood as a means to discern the fit both between and among the three levels of analysis, then the independent validity of inquiry concerning the fit between principles and rules becomes obvious. That is a crucial point missed in critiques that fault principles for not being values, and a point missed in Craswell’s argument Against Fuller and Perdue. Were that myopia not revealed, the contribution of Farnsworth’s Regret would be obscured.

Perhaps even more troubling for jurisprudential investigation at the level of principles is Craswell’s conclusion that Fuller’s interest analysis does not provide the means to describe accurately the function of contract damages rules. It is necessary to appreciate the substance of Craswell’s critique by offering a depiction of his conception of the relationship among Fuller’s interests, which might pertain as well to the interrelationship among Farnsworth’s principles. From those premises, a contrasting and richer sense of the relationship among principles emerges, and that sense better captures the limited contribution of Farnsworth’s Regret to Contract “science.”

B. POINTS ON A CONTINUUM

Fuller describes the three interests as proceeding in ascending order based on the quantum of recovery that each would provide.\textsuperscript{93} From that description, one could understand Fuller as arguing simply that because courts often award less than full expectancy, Contract does not unambiguously and certainly vindicate the expectation interest; therefore, explanations of Contract dependent on that conception of the role of expectation are flawed, or at least incomplete. That is in fact the popular construction of Fuller’s argument, and it is the construction Craswell ultimately relies upon to support his critique.\textsuperscript{94}

\textsuperscript{92} Craswell does briefly note at the outset of his argument that Fuller himself is on record as having intended a different legacy for his Reliance Interest article than Craswell’s critique would seem to afford it. Craswell cites a letter from Fuller to Karl Llewellyn in support of the conclusion that Fuller saw the expectation, reliance, and restitution interests as “something closer to a continuous scale of remedies, rather than three discrete ‘interests.’” Craswell, supra note 12, at 9 (quoting Robert S. Summers, Lon L. Fuller (1984)). The actual language in the letter, though, describes an analysis “which breaks down the contract—no contract dichotomy, and substitutes an ascending scale of enforceability.” Id. So, it is Craswell’s gloss on that language that suggests a continuum.

\textsuperscript{93} See Fuller & Perdue, supra note 17, at 56.

\textsuperscript{94} Craswell acknowledges that he is taking issue more with the attention that Fuller’s remedial interests have received than he is with what Fuller might have intended for them. See Craswell, supra note 12, at 9, 55. If so, Craswell’s criticism is directed more to what he deems to be a less than legitimate use of Fuller’s analysis than it is to the message Fuller intended. But, recall that Craswell does describe Fuller’s interests as points on a continuum, even after taking account of Fuller’s clarification in Fuller’s letter to Llewellyn. See supra note 92.
So construed, the image of the interests' interrelation that emerges is one depicting points on a recovery continuum. Restitution interest equates with less recovery, so courts that award less than reliance or expectation give effect to the restitution interest and not the expectation or even reliance interests. Courts awarding reliance damages, in turn, are vindicating the reliance interest rather than the expectation interest. Moreover, insofar as courts award an amount of damages that is less than full expectation but more than mere restitution, they are confirming that Contract's focus is on reliance rather than expectation.

Farnsworth, similarly, mines the contracts cases to discern the bases supporting the courts’ decision to enforce or not to enforce certain promises. When Farnsworth finds (even potential) evidence of the promisee’s reliance on the breached promise and a court’s enforcement of that promise, he concludes that the court was applying a reliance principle, which Farnsworth, along with Fuller, argues provides the dominant explanation for why promises are enforced as well as the dominant measure of contract enforcement.

Craswell concludes that Fuller’s analysis fails because the actual amount of damages awarded in cases of contract breach does not track nicely the three categories of interests Fuller formulates: Sometimes the damages awarded are more than expectation, sometimes less. Nonetheless, describing damages in terms of their relationship to the vagaries of restitution or reliance “interests” does not advance the inquiry beyond a description that focuses on awards’ relationship to expectation. Fuller’s construction “obscures” both differences among cases that need to be distinguished and similarities among cases that need to be reconciled.

Putting the expectation, reliance, and restitution interests on a continuum would support Craswell’s critique. And, if Fuller had posited three Contract “measures” rather than three Contract “interests” it would have been correct to put the three constituents on a continuum—to understand them in two dimen-

95. See Farnsworth, supra note 8, at 57-59.
96. See id.
97. Craswell proposes that categorization of damages in the final part of his article. See Craswell, supra note 12, at 80-88. The terms of his proposition are important and revealing:

In short, the classification that I propose has three parts: (1) remedies above expectation, (2) remedies that approximate expectation, and (3) remedies below expectation. The middle category—remedies that approximate the expectation interest—is essentially the same as Fuller and Perdue’s (and as the traditional category that preceded them), so I cannot claim any improvement.

Id. at 84-85. To the extent that Fuller helped us better understand the fit between the reliance interest and the expectation measure of damages (Craswell’s middle category), Craswell’s conclusion obscures Fuller’s contribution. When Craswell writes of “remedies that approximate expectation,” is he referring to the cases that in fact approximate true expectation or the cases that say they are awarding benefit of the bargain damages when in fact they are awarding damages that approximate the value of the promisee’s reasonable reliance? Though Craswell does observe that some cases will award reliance damages to “protect a rough estimate of the expectation interest,” he does not include Fuller in the list of authors who have revealed that apparent incongruity. Id. at 65 n.142.
98. See id. at 66.
sions, if you will. If expectation, reliance, and restitution are three points on a damage measure continuum, then even though there is an unlabeled point between expectation and reliance, there is not a point that describes the case in which

reliance damages are being used to *increase* the promisee’s recovery, because otherwise, the promisee would be able to prove his expectation interest and thus would recover nothing at all. Surely there is an important difference between using reliance damages to increase the measure of recovery, and using reliance damages to reduce it. A classifying scheme that lumps together both of these uses of reliance damages thus suffers from an obvious disadvantage.99

Note that Craswell uses the term “reliance damages” rather than “reliance interest” in the ultimate sentence. That may explain, in part, the difference between Fuller’s and Craswell’s perspectives. “Damages,” or their “measure,” are a quantitative matter that allow of depiction on an ascending scale from restitution through reliance to expectation. Had Fuller used the term “measure” instead of “interest,” a conscientious reader, such as Craswell, could conclude that at best Fuller is describing rule confusion, and not the interrelation of principles that explains the operation of Contract. However, “interests” are another matter altogether, and they may require a different conception in order to afford inquiry at the level pursued by Fuller and Farnsworth its due.

C. COINCIDENCE

Instead of a continuum, imagine a depiction of the interdependence of Fuller’s interests or Farnsworth’s principles in the Contract law more akin to a Venn Diagram—a system of three circles, each of which share common area with one or both of the other circles. Were our conception of principles informing Contract limited to three in number, then a Venn Diagram could depict the type of interrelations posited by Fuller and Farnsworth. In fact, given that Fuller describes only three interests tugging at the fabric of Contract, the Venn Diagram analogy—and it is only an analogy—works quite nicely.

But, Farnsworth describes more than three constituents, or principles, that support the law of regretted decisions. Though, strictly speaking, more than three constituents will not fit on a Venn Diagram,100 there is no need to limit

99. *Id.* at 67.
100. The reason to require that each of the interests or principles have their own circle, rather than combining different even though related interests or principles within the circumference of a single circle, is that at the level of inquiry pursued by Fuller and Farnsworth, the constituents of Contracts, though ultimately not fundamental in the sense that values would be, are finite elements at their level of inquiry in the trichotomy. That is, though more than one principle may have a bearing on the formulation or application of a rule, we can define one principle in terms that describe its difference from other principles. Values might formulate the common points among principles, but that is an antecedent level of inquiry. If a principle were formulated in terms that overlapped with the terms of
depiction of the interrelation among Contract principles to three dimensions. Though only three of Farnsworth’s principles directly pertain to the Contract law,¹⁰¹ that would seem to be a matter of the limit of Farnsworth’s thesis rather than a matter of intellectual necessity. Subsequent commentators may discover another element at the level of principle that would either refine Farnsworth’s existing tripartite construction or add an additional principle.¹⁰²

A test of Farnsworth’s principles, to determine whether they function effectively on the intermediate level of inquiry between values and rules, is whether they explain the rules’ operation. Another test would be whether they flow from the values that inform Contract. We do not (yet) know what values explain the principles that explain the rules,¹⁰³ so our best approach is to test principles by what we can identify: the rules providing the principles’ elaboration. That is precisely what Farnsworth, and Fuller before him, have accomplished. Farnsworth, however, goes a bit further in his Contract “science.” He has devised an argument for the amendment of an existing rule because it clashes with the intention principle. Farnsworth would recognize and give effect to the intention principle by bringing back the seal or some similarly simple surrogate for it. In that way, the Contract law’s interest in the parties’ intention, a principle of Contract, would be manifest in the rules that flow from that principle. It is neither an earthshaking nor an original proposal,¹⁰⁴ but Farnsworth’s method does effectively depict the interdependent roles of principles and rules in the Contract “science” trichotomy.

In fact, Farnsworth has done more than that; he has even cast some light on the fiber that connects principle and rule insofar as his intention principle and the seal are concerned. Farnsworth recognizes that the consideration doctrine generally and abolition of the seal particularly are the product of paternalism,¹⁰⁵ a predisposition that, at least in some settings, is inconsistent with the intention principle. So, after formulating the role of paternalism in that way, Farnsworth is able to discover the contexts in which paternalism fails, and it fails because it is inconsistent with the intention principle.

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¹⁰¹. The reliance, intention, and anti-speculation principles apply directly to Contract. See supra text accompanying notes 33-37, 41-42.

¹⁰². Of course we can only venture the guess that there are more than three principles. It may be that Fuller—with regard to damages—and Farnsworth—with regard to regret—have described the only three constituent principles that provide elaboration of the fundamental Contract values. It is difficult to venture more than a guess, though, until more work is done to determine the fundamental values and their fit with principles.

¹⁰³. That is to say that we do not have consensus on what values animate Contract principles. That is not to say that further inquiry will not discover the values or that there needs to be consensus in order for us to understand that particular principles are related to particular values. Recall that Farnsworth at the outset disclaims any faith in a level of inquiry antecedent to his principles so far as his Contract inquiry in Regret is concerned. See supra text accompanying note 10.

¹⁰⁴. See supra text accompanying note 19.

¹⁰⁵. See FARNSWORTH, supra note 8, at 75-88.
From Farnsworth's system, we discern a means to appraise the fit between principles and rules and to recognize the instances when rules must be reconsidered in light of their failure to fit with principles. We also get some sense of the fiber that connects principles to rules—for example, paternalism not misplaced. It may well be that others have more effectively investigated that fiber, at least in cases of unequal bargaining. 106

Nevertheless, measured against Fuller and Craswell's critique of Fuller's approach, Regret has a deficiency that may impair its utility going forward. Where Fuller provides us with interests (principles) that, in combination, describe the operation of Contract rules generally, Farnsworth's book does not similarly provide us with tools that so clearly will help us explain the cases (and rules) as Contract evolves. To some extent, that is a consequence of Farnsworth's arguably broader focus: He is trying to discover discontinuities among different areas of the law's treatment of regretted decisions. Farnsworth goes beyond the bounds of Contract, and in the course of doing so offers important—albeit, again, not always original107—observations about the discontinuities among the law's responses to regret.

Once Farnsworth's principles analysis has been put into a perspective that takes account of its fit with Contract theory, it is necessary to arrive at some conclusion about the extent to which Regret advances the literature. That is the focus of the final section of this Essay.

III. THE LIMITS OF FARNSWORTH'S PRINCIPLES

While Farnsworth brings his principles to bear on discrete issues in the Contract law—for example, paternalism and the enforcement of gift promises—his statement of the principles supports the conclusion that, at least in the case of the three that are pertinent to Contract (intention, reliance, and anti-speculation), the principles are complete and exclusive. That is, we should find that one or more of the principles, either separately or perhaps even in some combination, support revealed Contract doctrine. If we can identify a Contract doctrine that is not supported by Farnsworth's principles, then the value of his contribution to the literature is dubious.

Consider, then, the Contract law of conditions and cases such as Jacob & Youngs v. Kent.108 The decision, by Justice Cardozo, concerns a fundamental

106. One of the clearest expositions of the limits of bargaining in Contract is found in Michael J. Trebilcock's book. See TREBILCOCK, supra note 3. Farnsworth's study does not compare favorably with Trebilcock's work, but that is not to deny the contributions of Regret.

107. Compare Goetz & Scott, supra note 5, at 1304 n.103 ("Although causa mortis gifts do not require the same formality as testamentary dispositions, such transfers are policed more carefully than are inter vivos gifts . . . . On the other hand, when a gratuitous promise is in writing, courts have often manipulated the delivery requirements of the law of gifts in order to enforce the transfer.") (citations omitted), with FARNSWORTH, supra note 8, at 87, 136-38.

108. 230 N.Y. 239 (1921). This case appears in Farnsworth & Young's Contracts casebook, supra note 15, at 520, as do many of the cases discussed in Regret.
issue in Contract law, whether the contractor’s tender of “Cohoes” pipe when the contract specified “Reading” pipe was a breach that would justify the owner’s refusal to accept and pay for the completed structure. Justice Cardozo found that the defect was not significant, in that the two brands of pipe were substantially indistinguishable, and so the contractor’s imperfect tender was not the breach of a condition that would support forfeiture. The case remains good law, and, in fact, is formulated as part of section 241 of the Restatement (Second) of Contracts, a portion of the Restatement written by Farnsworth.

In order for Farnsworth’s principles to play the role in Contract that he claims for them, we would have to find that one or more of his three Contracts principles operate or cooperate in Jacob & Youngs (and in Section 241, for that matter). But, it would seem that the case does not respect the intention principle: The owner did not get what he contracted for—Reading pipe. Accordingly, the case and the doctrine for which it stands do not vindicate the intention principle, unless we stretch to say that the court discovered the parties’ true rather than expressed intention—a stretch that would ultimately render the intention principle meaningless. Further, there is no evidence in the case of any type of reasonable reliance that would support the holding: How could the contractor have relied on the owner’s agreement to accept Cohoes pipe when the contract clearly called for Reading? There is also no suggestion in the case that the holding was designed to preclude the owner’s speculation at the expense of the contractor, so no violation of the anti-speculation principle is obvious.

In fact, what the opinion stands for, perhaps more than anything else, is the rule that substantial performance will not be a material breach justifying forfeiture so long as the nonconforming tender was not willful and did in fact comport with standards of good faith and fair dealing. It is difficult, then, to find that Farnsworth has provided us the means to make sense of all of Contract, even at the intermediate level of principle. Measured by the standard established

110. See 230 N.Y. at 241, 243-44.
111. Restatement (Second) of Contracts provides:

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

ReSTATEMENT (SECOND) OF CONTRACTS § 241. Jacob & Youngs v. Kent is the subject of Illustration 6 to that Restatement section.
in Fuller’s interests analysis, Farnsworth’s *Regret* is deficient. While his formulation of principles explains the decisions he sets out to explain, it falls short of providing the broad perspective Fuller offers. Fuller provides us the key to the damages vindicated by Contract and affords us the means to appreciate the interrelation of those interests. While it is true that he does not treat the role of punitive damages,

strictly speaking, exemplary recovery is the province of tort law and might best be understood as serving a non-Contract interest. So construed, Fuller’s interests make sense of Contract-based damages when there has been no compromise of tort interests. Fuller’s “interests,” then, are more like principles than are Farnsworth’s principles.

**Conclusion**

This Essay has offered the first, albeit tentative, steps toward the development of a perspective to formulate a Contract “science.” By positing a fundamental trichotomy, Values – Principles – Rules, the inquiry has supported conclusions about Contract jurisprudential perspectives generally and Professor Farnsworth’s principles specifically. Once the relationship among the levels of investigation is revealed, we may understand the relative efficacy of contrasting perspectives in terms that, it is hoped, provide a prolegomenon for further study.

Appreciated as an effort to make sense of all of Contract at the level of principle, Farnsworth’s effort does not compare favorably with the contribution of Fuller. Only when the relationship among Fuller’s interests at the level of principle is appreciated in terms that respond to Craswell’s criticism does the role of principle in Contract “science” come into focus. Farnsworth’s *Regret* is a contribution to the literature and describes a perspective that may merit further consideration, but, ultimately, we are left somewhat disappointed that the scholar responsible for the frame of reference so many of us bring to Contract has not done more. Perhaps, unfairly, we have come to expect too much.

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112. Craswell notes this omission in Fuller’s thesis. See Craswell, supra note 12, at 57. While Craswell faults Fuller for not taking account of punitive damages, it might be argued in Fuller’s defense that to the extent that decisions impose contract damages with some punishment in mind, those damages to the extent that they sound in Contract nevertheless proceed from one or more of the three interests Fuller identifies. That is, when a court resolves uncertainty in favor of the non-breaching party, it is merely affording the jury more latitude within the constraints of the expectation, reliance, restitution construct. See, e.g., United States Naval Inst. v. Charter Communications, Inc., 936 F.2d 692 (2d Cir. 1991); *Restatement (Second) of Contracts* § 352 cmt. a (doubts to be resolved in favor of the non-breaching party).